

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRUCE KNAAK

Claimant

VS.

CASE CORPORATION

Self-Insured Respondent

)
)
)
)
)
)
)

Docket Nos. 251,521 &
251,857

ORDER

Respondent requested review of the September 23, 2004 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on January 18, 2005, in Wichita, Kansas.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Stephen J. Jones, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that neither disputes the \$737 average weekly wage found by the ALJ for purposes of both docketed claims, and respondent does not dispute the compensability of the claim encompassed by Docket No. 251,521, or the ALJ's award of temporary total disability benefits for the period January 25, 2000, to September 25, 2000, in that particular claim.

ISSUES

The ALJ awarded claimant a 75.5 percent permanent partial impairment rating based upon a work disability as a result of a series of work-related injuries culminating on January 25, 2000. In awarding work disability benefits, the ALJ concluded claimant's conduct in connection with a series of welds performed on January 20, 2000, led to his

subsequent termination, but did not rise to the level of willful misconduct. Rather, she concluded claimant was performing the welding while wearing wrist splints and as such, his flexibility was limited and as a result he performed unacceptable welds. Thus, his conduct, while admittedly substandard, did not demonstrate a lack of good faith in retaining his employment. Accordingly, the ALJ found claimant's termination did not defeat his claim of a work disability under K.S.A. 44-510e(a). The ALJ further found that claimant had "demonstrated that he made a good faith effort to find work"¹ after leaving respondent's employ and therefore the ALJ used claimant's actual 100 percent wage loss. That figure, when averaged with a 51 percent task loss opined by Dr. Pedro Murati, yields the 75.5 percent work disability found by the ALJ.

With regard to Docket No. 251,857, the ALJ concluded claimant sustained a compensable injury to his back, but that based upon the testimony of Dr. Philip Mills, his accident resulted in only a temporary aggravation and not in a permanent injury. Thus, claimant's request for temporary total disability compensation from January 25, 2000, to July 27, 2000, was denied, and the ALJ limited respondent's liability to providing reasonable and necessary medical care to relieve claimant's symptoms from the January 20, 2000 accident.

The respondent appeals the ALJ's Award and focuses its arguments on the single issue of the nature and extent of claimant's disability as it relates to Docket No. 251,521. Respondent contends the medical evidence shows claimant sustained only a 1 percent functional impairment to his right upper extremity as a result of his work-related injury, based upon Dr. Mills' testimony, and not a whole body impairment as found by the ALJ. Respondent alternatively argues that even if claimant sustained a whole body impairment, he was terminated for cause as a result of his willful behavior on January 20, 2000. As such, respondent believes claimant's lack of good faith in retaining his employment limits his recovery to a functional impairment.

As for Docket No. 251,857, although respondent suggests claimant failed to sufficiently establish that he suffered a compensable injury on January 20, 2000, respondent asks the Board to affirm the ALJ's findings.

Conversely, claimant requests that the Board affirm the ALJ's Award in Docket No. 251,521. Claimant asserts the medical evidence fully supports the ALJ's finding that he suffers from a whole body impairment as a result of the work he performed for respondent. He also contends that he is entitled to work disability because the conduct that led to his termination was, at worst, negligent and therefore does not establish a lack of a good faith effort at retaining his employment with respondent. Further, claimant's effort of finding appropriate employment after his termination from respondent's employ was sufficient to

¹ ALJ Award (Sept. 23, 2004) at 8.

establish the good faith required by *Foulk*² and *Copeland*.³ As a result, the ALJ appropriately concluded claimant sustained a 75.5 percent work disability based upon his actual wage loss and a 51 percent task loss.

As for Docket No. 251,857, claimant asserts his January 20, 2000 accident left him with a permanent impairment to his low back. Thus, contrary to the ALJ's Award, claimant maintains he is entitled to a 15 percent permanent partial impairment to the whole body.

The issues to be decided by the Board are as follows:

1. Whether claimant sustained an accidental injury arising out of and in the course of his employment with respondent on January 20, 2000 (Docket No. 251,857 only); and
2. The nature and extent of the claimant's impairment (in both Docket Nos. 251,521 and 251,857).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes the ALJ's Award in Docket No. 251,521 should be modified while the Award in Docket No. 251,857 should be affirmed.

The ALJ provided an extensive summary of the facts of this case and the Board hereby adopts those as its own. Accordingly, they will not be restated except so as to explain the Board's findings. Highly summarized, claimant alleges he sustained a series of injuries over a period of time culminating on January 25, 2000,⁴ as well as an acute injury on January 20, 2000.⁵ Only the compensability of the January 25, 2000 accident is disputed while the nature and extent of claimant's permanent impairment is contested in both docketed claims.

In Docket No. 251,521, claimant alleges he suffers from a bilateral wrist condition known as Kienbock's disease which he alleges was either caused or aggravated by his work activities. He testified he was generally able to perform his job as a welder, albeit with

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ This claim is docketed as No. 251,521.

⁵ This claim is docketed as No. 251,857.

the aid of bilateral hand splints and some self accommodation. On January 20, 2000, he was asked to perform a different welding job that, due to alleged equipment problems and the restricted mobility in his wrists, claimant contends he was unable to perform in an adequate manner. As a result, he was terminated from his job with respondent for producing bad welds. He also alleges he sustained a back injury on that same date.

Docket No. 251,521

The threshold issue the Board must first determine is whether claimant sustained a permanent impairment to a scheduled member, specifically his right upper extremity, or if he sustained a whole body impairment, which under K.S.A. 44-510e(a), would entitle him to recover a general bodily permanent impairment, commonly known as a work disability. In deciding this issue, the Board must consider the medical testimony relating to claimant's diagnosis and resulting impairment opinions.

Claimant was first seen by Dr. Ronald Davis, an occupational medicine physician, on March 31, 1998. Dr. Davis documented complaints of numbness to the left third and fourth fingers and the right second finger along with right wrist pain. Dr. Davis felt these complaints were caused by claimant's welding activities at work. He evaluated claimant's range of motion in his upper extremities and found it to be normal. Claimant demonstrated negative Tinel's and Finkelstein's, but had a positive Phalen's finding on the left. He also found tenderness medially and laterally in both upper extremities. Dr. Davis diagnosed bilateral wrist and hand pain and numbness.

Claimant was provided with conservative treatment including occupational therapy and conditioning exercises. Limitations of moderate to regular duty for both wrists was recommended and bilateral splints at night were suggested.

Dr. Davis saw claimant again on April 21, 1998. At that time, claimant was wearing his splints at night and while still having stiffness in his right wrist and numbness with continuous repetitive motion, his pain was lessening. On the May 12, 1998 visit, claimant reported that his numbness was going away, but that he continued to be bothered by the pain in his right wrist.

At the next visit, June 2, 1998, Dr. Davis indicated that claimant was now permitted to use the right wrist splint as needed with heavier or repetitious tasks over the next three weeks and to continue his use of Naprosyn. During that same visit claimant denied any pain or numbness in the left wrist over the past three weeks.

Approximately a year later, on May 12, 1999, claimant saw Dr. Davis again. On that date Dr. Davis recommended claimant wear "wrist splints as needed".⁶ At this point

⁶ Davis Depo. at 16.

claimant was complaining of a flare up of symptoms in his right hand. He indicated he was dropping tools with increased pain at the end of the day. Claimant reported he was wearing a splint on his right wrist while at work.

Then, on June 23, 1999, claimant sought treatment again from Dr. Davis, who testified that it appeared from his records, that he recommended claimant wear a splint on both wrists based upon claimant's bilateral wrist complaints. A week later claimant reported both wrists were "70-80 percent better".⁷ Dr. Davis ordered x-rays which showed no cervical impingement which might have explained claimant's complaints. In addition, the nerve conduction study Dr. Davis had performed was normal, although "suggestive of a chronic type C7 radiculopathy mild to moderate degree."⁸

By July 22, 1999, claimant reported both his wrists were improved and that the wrist splints, worn at night, were helpful. However, in order to address the possible radiculopathy, claimant was referred to Dr. Harry Morris.

Dr. Morris first evaluated claimant on October 28, 1999. Claimant voiced complaints about his right wrist only and according to Dr. Morris, never complained about his left wrist. Dr. Morris had x-rays done which identified abnormalities in the lunate bone of claimant's right wrist. A MRI was then ordered to rule out avascular necrosis of the lunate joint, or what is otherwise known as Kienbock's disease. The MRI confirmed this diagnosis. Dr. Morris explained that when a bone loses its blood supply, the bone will die. In this instance, the lunate bone in claimant's right wrist lost its blood flow and was progressively dying.

Treatment options for this condition vary and Dr. Morris recommended claimant have his hand placed in a cast. After 6 weeks in a cast, claimant's condition was the same. The cast was removed, and in November 1999, he was placed in a Futuro splint, which is a device with a metal bar on the bottom side to keep the wrist in a straight position. The goal was to limit wrist motion and thereby minimize the pain complaints. Although claimant's condition in his right wrist continued to progress as evidenced by x-rays, he had not yet had the bone collapse and the mobilization had helped his symptoms. Dr. Morris recommended he continue with the splint.

It is important to note that Dr. Morris testified that he only recommended a splint to claimant's right wrist and that all of claimant's complaints were to his right wrist. However, the work release dated December 20, 1999 and included within his records, reference wrist *splints*. Dr. Morris explained that his nurse writes those orders and he was unable to recall whether that notation suggests claimant was wearing a splint on each wrist or that he

⁷ *Id.* at 22.

⁸ *Id.* at 25.

thought claimant should wear splints bilaterally. The same contradiction comes again in the records in February 2000. In any event, Dr. Morris was very specific in his recollection that as of November 29, 1999 the only splint provided and recommended to claimant was a Futuro splint for the right wrist.

Claimant then began treatment with Dr. Fred Smith. Dr. Smith saw claimant four times, the last visit coming on September 25, 2000. He diagnosed Kienbock's disease in both of claimant's wrists and at the conclusion of his treatment, he assessed a 6 percent to each of claimant's upper extremities based upon the 4th edition of the *Guides*.⁹ When converted and combined, this 6 percent yields an 8 percent impairment to the whole body, all of which Dr. Smith believed was attributable to or aggravated by claimant's work activities.

Upon cross examination, Dr. Smith admitted that he erroneously assumed Kienbock's disease had been diagnosed in *both* of claimant's wrists. He explained that he made this assumption based upon Dr. Morris' records. He further explained that there is no applicable table within the *Guides* to use for rating claimant's avascular necrotic condition. Rather, his impairment rating was based upon Table 3/61 contained on page 26 of the *Guides* which relates to arthritic changes. Yet, Dr. Morris further conceded he had no x-rays to document any degenerative changes in claimant's left wrist. He testified he based his ratings upon claimant's symptomatology.

Claimant was evaluated by Dr. Philip Mills in May 2000. Dr. Mills confirmed the diagnosis of Kienbock's disease in the right wrist. After examining claimant and reviewing the applicable records, Dr. Mills assigned a 1 percent permanent partial impairment of function to the right upper extremity. He reasoned that although claimant's range of motion was normal, he believed that claimant deserved some permanency for the subjective complaints of pain to his right wrist. Thus, he believed the 1 percent was appropriate.

Dr. Mills also testified that he found no evidence of radiculopathy in the claimant's cervical area, at least as of the time Dr. Mills last examined him, nor did he identify avascular necrosis in claimant's left wrist. He reviewed the x-ray report of claimant's left wrist from January 27, 2001, and testified that claimant's left wrist was normal.

Finally, claimant was evaluated by Dr. Pedro Murati. Dr. Murati performed an examination and had the benefit of the medical records including the x-rays ordered by Dr. Morris. Based upon these documents and his examination, he diagnosed right wrist pain secondary to Kienbock's disease, left wrist pain secondary to possible early stages of

⁹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

Kienbock's disease and mid back pain secondary to a possible cervical radiculopathy.¹⁰ Each of these conditions were, in his view, a direct result of or aggravated by the claimant's work-related activities.

Dr. Murati assessed a 9 percent to the right upper extremity and a 6 percent to the left. The impairment rating on the left upper extremity was not for Kienbock's disease, but instead for mild crepitus he identified during claimant's examination.

The ALJ concluded that "[c]laimant's testimony, plus the medical testimony, is persuasive that [c]laimant's condition in his bilateral upper extremities is causally related to his work."¹¹ While the Board agrees that claimant suffers from a condition that is work-related, the Board finds the ALJ's ultimate conclusion as to the nature and extent of claimant's impairment should be modified.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹³

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.¹⁴ The trier of fact is not bound by the medical evidence or other controverted testimony presented in the case, but has the responsibility of making its own determination as to which testimony is accurate or credible.¹⁵

In this instance, the Board is persuaded that claimant suffers from Kienbock's disease in his right upper extremity only. The evidence as to his condition and his ongoing complaints in his left wrist is unpersuasive. Dr. Smith simply assumed claimant had Kienbock's in his left wrist. When he was corrected, he retreated to a generic assessment of arthritic changes, a condition that had no corroboration within the medical records other than claimant's sporadic complaints of pain or numbness. Thus, his opinions are suspect.

¹⁰ Murati Depo. at 11-12.

¹¹ ALJ Award (Sept. 23, 2004) at 7.

¹² K.S.A. 1999 Supp. 44-501(a).

¹³ K.S.A. 1999 Supp. 44-508(g).

¹⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹⁵ *Id.*

Even Dr. Murati indicates the diagnosis of Kienbock's disease in the left wrist is only "possible". In fact, he rated solely for the crepitus he found, which was not identified by any of the other physicians who testified in this matter. The medical evidence is uncontroverted that x-rays and a MRI will definitively show whether bone deterioration has occurred. Here, x-rays of the left wrist do not show bone deterioration nor any arthritic changes. Accordingly, the Board finds that claimant has failed to sustain his burden of establishing it is more probably true than not that he sustained a permanent impairment in his left wrist as a result of his work activities.

Three physicians have rated the claimant's right upper extremity. Dr. Mills assessed a 1 percent, Dr. Smith assessed a 6 percent and Dr. Murati assessed a 9 percent. The Board believes claimant's true impairment lies somewhere in between the high and low ratings and finds claimant's permanent impairment to be 5 percent to the right upper extremity at the level of the forearm.

Because the Board has determined claimant sustained a scheduled injury, claimant is not entitled to permanent disability benefits, under K.S.A. 44-510e. Instead, claimant's permanent disability benefits are governed by K.S.A. 44-510d, the scheduled injury statute.

Docket No. 251,857

Claimant testified that while performing his work duties on January 20, 2000, he was required to push or pull a large work piece on the chassis line weighing more than 100 pounds. Claimant further testified he experienced an immediate onset of mid back pain and advised his supervisor, Scott Williams.

At the ALJ's direction, Dr. Mills was authorized to evaluate and treat claimant for the physical complaints attributable to the January 20, 2000 accident. Following his examination of claimant on May 9, 2000, Dr. Mills found a causal connection between his work activities of January 20, 2000 and claimant's complaints of pain on the left side of the mid-thoracic area of his back. He recommended a short course of physical therapy and by June 27, 2000, claimant reported substantial improvement.

As of June 27, 2000, Dr. Mills concluded claimant was at maximum medical improvement. Based upon the *Guides*,¹⁶ he concluded claimant fell within the DRE category I impairment which reflects a 0 percent permanent impairment. In contrast to this opinion is that of Dr. Murati who opined that claimant sustained a 15 percent permanent partial impairment (DRE cervicothoracic category III) to the whole body as a result of the January 20, 2000 mid back injury.

¹⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹⁷

Here, the ALJ concluded that Dr. Mills' opinions as to the causation and ultimate impairment issues were more persuasive than either the arguments made by respondent's counsel or Dr. Murati. While she concluded claimant sustained an accidental injury on January 20, 2000, she found that he sustained no permanent impairment as a result of that injury. The Board agrees with this conclusion and affirms the ALJ's Award in all respects as it relates to Docket No. 251,857.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 23, 2004, is modified as follows:

Docket No. 251,521

The claimant is entitled to 35 weeks of temporary total disability compensation at the rate of \$383.00 per week in the amount of \$13,405.00 followed by 8.25 weeks of permanent partial disability compensation, at the rate of \$383.00 per week, in the amount of \$3,159.75 for a 5 percent loss of use of the right forearm, making a total award of \$16,564.75.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

Docket No. 251,857

All findings regarding this docket are hereby affirmed.

¹⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Stephen J. Jones, Attorney for Self-Insured Respondent
 Nelsonna Potts Barnes, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director